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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

**No. 1467**

WALL STREET TRANSCRIPT CORPORATION
By Richard A. Holman,
*Petitioner,*

*vs.*

SECURITIES AND EXCHANGE COMMISSION,
*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## PETITIONER'S REPLY BRIEF

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### Preliminary

1. It is striking that respondent's brief does not address itself to the importance of the issues the petitioner requests this Court to review. In effect the respondent by its silence appears to concede that the serious questions herein, many of which are of first impression, should be reviewed by this Court. Some of these questions are listed herewith in summary form:

a) Presented here are questions of first impression as to the construction of the Investment Advisers Act of 1940 ("Act"), a major piece of federal legislation. These involve both the scope of the term "investment adviser" and the sweep of the statutory exclusion from the Act.

b) Grave and serious constitutional questions of novelty and complexity under the First Amendment are raised here. May the Act constitutionally impose the burden of *investigations* on every member of the press publishing financial or economic news or news concerning securities? May a licensing statute constitutionally be applied to the New York Times or the Transcript or for that matter to any member of the press? May Congress impose standards of fitness for those who work for the press? May Congress constitutionally condition publication, or use of the mails or interstate facilities, by the Transcript or any *member* of the press upon registration and licensing?

c) Serious questions are raised as to the meaning and effect of *Oklahoma Press Pub. Co.* v. *Walling*[1] upon which respondent heavily relies. Is the *Walling* principal limited, as this Court there indicated, to non-licensing statutes, or to statutes which do not involve exclusion from commerce of a newspaper of a non-conforming publisher, or to statutes which involve no restraint on expression? Or does *Walling* permit the agency to make the initial determination of jurisdiction as to any investigation under any statute, no matter its nature or constitutionality, as respondent here asserts?

2. It is again striking that respondent's brief does not try to answer the well reasoned opinions and findings of the District Court or of Judge Danaher. And it is

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[1] 327 U.S. 186 (1946).

even more striking that respondent does not even attempt to support the rationale or holding of the majority below, or to meet the issues raised in the petition.

3. It is again striking that respondent does not attempt to answer petitioner's argument and authorities under Questions 2 and 3 (Pet. pp. 18-26).

Its arguments as to Questions 1 and 4 (Pet. pp. 11-17) are the erroneous contentions that the Act is not a censorship statute and the constitutional issues raised therein are not ripe for review. The question of censorship will be discussed *infra*. As to ripeness the respondent is clearly wrong and misconceives what the case is all about.

First, the majority below squarely faced the constitutional issues and decided them against the petitioner. The majority sustained the constitutionality of the Act, both on its face and as the SEC seeks to apply it. As shown in the petition (pp. 11-21) that ruling is clearly wrong in all respects. But, as the majority below clearly understood, without a ruling of constitutionality the investigation could not continue.

Second, respondent completely ignores the First Amendment rights of the petitioner and in effect argues that investigations are not subject to the First Amendment. This Court has many times ruled to the contrary.[2]

4. The respondent suggests that at a later date when there is, in its term, "a full and complete factual rec-

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[2] *E.g.*, *Watkins* v. *United States*, 345 U.S. 178 (1957); *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957); *N.A.A.C.P.* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *De Gregory* v. *Attorney General of New Hampshire*, 383 U.S. 825 (1966).

ord", the time will come for a decision on the constitutional issues. Respondent suggests not one possible fact, not one piece of evidence, which is not now in the record and which could be utilized to flesh out the record or lay any basis for the contemplated investigation. There is no fact and there is no conceivable state of facts under which the Act—the core of which is licensing and censorship—could constitutionally be applied to the Transcript or to the press or under which the Transcript or any member of the press could be licensed under the Act as a condition to continued publication. Petitioner challenged the respondent (p. 17) to state any such facts and none has been stated.[3]

5. Respondent's statement of the question presented (br. p. 2) shows that the contemplated investigation has no legitimate purpose, and that there is here lacking any basis for any belief that the investigation will be productive. If the investigation is to determine whether a publication which "reprints investment advice" is an investment adviser under the Act, all one needs to do is read the publication. Respondent, although challenged on this point (Pet. p. 32), has been unable to suggest any reason why the publication itself is not the sole basis for such determination or why any investigation at all is necessary.[4] Indeed, virtually every newspaper "reprints investment advice" (116a-132a).

To permit the judgment to stand would be in Judge Danaher's words "to ensconce administrative absolutism at its unreachable zenith".

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[3] See *Mills* v. *Alabama*, 384 U.S. 214 (1966); *Cameron* v. *Johnson*, 381 U.S. 741 (1965).

[4] To quote Senator Hennings, "the best evidence" when dealing with a newspaper "is certainly the product itself". *Russell* v. *United States*, 369 U.S. 749, 774 (1962).

## The Act Unconstitutionally Abridges Freedom of the Press

Respondent stresses at length its erroneous notion that the Act contains no element of "censorship" (br. pp. 5-8). Because of such stress, we add a few words on this point to the discussion in the petition.

Respondent's brief is predicated on the contentions that (br. pp. 4-5), "The statute involved has basically only disclosure and anti-fraud provisions"; that (br. pp. 7-8) the Act is designed to eliminate "fraudulent conduct" and similar abuses; and that (br. p. 5), "There is no element of censorship in the Investment Advisers Act".

The respondent is wrong on all points. Indeed, it has retreated, from the views expressed by the majority below. The majority said (Appendix A *infra*, p. 8a):

> "The *core of the Act* is its registration provision §203, which renders it unlawful for a non-registered investment adviser to make use of the mails or any instrumentality of interstate commerce in connection with his business." (Emphasis supplied.)

With the exception of the registration provisions of the Act, and the provisions which supplement and provide penalties for non-registration, there is nothing new in the Act. The fraudulent conduct and other abuses proscribed in the Act were already unlawful under the Securities Act of 1933 and the Securities Exchange Act of 1934, neither of which conditions publication on licensing.[5]

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[5] Section 17 of the Securities Act of 1933, 15 U.S.C. Sec. 77q; Sections 9 and 10 of the Securities Exchange Act of 1934, 15 U.S.C. Secs. 78i and 77j.

The only real purpose and the core of the Act are the registration provision and the substantive provisions relating to failure to register. In blunt terms, the Act is a licensing statute.

The respondent's play on the word "censorship" is of no consequence. The issue here is unconstitutional abridgement of freedom of the press in all of its iniquitious forms. Contrary to respondent's suggestion, a requirement that material be cleared in advance by a censor (cf. respts. br. p. 8) is not the only means of unconstitutionally abridging freedom of the press. Licensing, injunctions against future publication, prior restraints on the publisher or on the publication, all unconstitutionally abridge freedom of the press and all are censorship and this Court has so held.

First, compulsory registration as a condition to utilization of the mails or interstate facilities unconstitutionally abridges freedom of the press and constitutes censorship and prior restraint in an extreme form.[6]

Second, the SEC may indefinitely defer action upon any application for registration without any possible recourse to the Courts. The Act is perfectly clear on this point.[7] Such statutory authorization for indefinite deferment of an application for registration, without recourse to the Courts, abridges freedom of the press and is prior re-

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[6] *Speiser* v. *Randall*, 357 U.S. 513 (1958); *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146 (1946); *Martin* v. *City of Struthers*, 319 U.S. 141 (1943); *Largent* v. *Texas*, 318 U.S. 418, 422 (1942); *Lovell* v. *City of Griffin*, 303 U.S. 444 (1938); *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

[7] Section 203e of the Act, 15 U.S.C. Sec. 80b-3e.

straint and censorship utterly repugnant to the Constitution.[8]

Third, contrary to respondent (cf. br. pp. 6, 8) the SEC may deny, suspend or revoke a registration on the basis of criteria not specifically set forth in the statute. Respondent (br. p. 7, fn.6) has set forth, in misleading part, grounds for revocation, suspension or denial of registration. Respondent did not set forth that the SEC may deny, revoke or suspend registration for violation of *any rule* or *regulation* promulgated by the SEC under the Securities Act of 1933, the Securities Exchange Act of 1934, or the Act.[9]

Fourth, a specific prior restraint adopted by the SEC authorizes suspension, revocation or denial of registration. Section 275.206(4)-1 of the regulations (Appendix B infra p. 58a) prohibits the publication of any advertisement which contains any testimonial. The absolute prohibition of any testimonial constitutes censorship more extreme than prior submission of the testimonial for clearance.

In any event, it is constitutionally irrelevant what the conditions to the registration are or whether only publishers who have committed serious offenses are barred from registration. The mere fact of compulsory registration as applied to the Transcript or any other newspaper is enough.

> "It is not the sporadic abuse of power by the censor but the pervasive threat of its very existence that constitutes the danger to freedom of discussion. One who might have had a license for the asking

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[8] *Freedman* v. *Maryland*, 389 U.S. 51 (1965); *Baggett* v. *Bullitt*, 377 U.S. 360 (1964); *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478 (1962); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940).

[9] Section 203e of the Act, 15 U.S.C. Sec. 80b-3e.

may therefore call into question the whole scheme of licensing . . ." [10]

In addition, all of the evils which this Court struck down in *Near* v. *Minnesota ex rel. Olson*[11] are present in this Act. The Act authorizes injunctions against the use of the mails or of interstate facilities of the publications of any unregistered publisher. On the basis of any one issue, all subsequent issues of the publisher may be enjoined and any further publication is punishable as a contempt. As this Court has ruled "This is of the essence of censorship.[12]

If registration can constitutionally condition use of the mails and interstate facilities by any member of the press which publishes financial or economic or business news, then it can constiutionally condition such use by a church or by any person no matter what the subject matter of the utterance may be. Today it is economic or financial or business news that is licensed, tomorrow it is church news, and the day after it is any kind of news which Congress may choose to interdict.

Our research has failed to disclose any attempt (other than at bar), since the adoption of the Bill of Rights, by the United States or by any State to require publishers to register with any government body as a condition to publication. Indeed, registration was the method utilized

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[10] *Thornhill* v. *Alabama*, 310 U.S. 88, 95 (1940). The government conceded in *Russell* v. *United States*, 369 U.S. 749, 777 (1962) that "Congress would have no power to establish standards of fitness for those who work for the press". But that is what Congress has done here if the Act applies to the press.

[11] 283 U.S. 697 (1931).

[12] *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931).

in early colonial days to control the press. The early colonial press was printed "by authority" and it was James Franklin who "unshackled" it by printing "his paper not 'by authority', but in spite of it.[13]

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[13] Emery, The Press and America, p. 49 (2d Ed. 1962), Library of Congress Catalog Card No.: 62-15294.